UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Rocky Mountain Planned Parenthood, Inc. d/b/a PPRM

Employer

and **Case: 27-RC-205940**

Service Employees International Union, Local 105

Petitioner

PETITIONER UNION'S BRIEF IN RESPONSE TO ISSUE RAISED IN GRANTED REQUEST FOR REVIEW

I. INTRODUCTION

In this representation case, SEIU Local 105 ("Union or Petitioner") petitioned for all clinical staff employees at 15 Colorado based health care centers operated by Planned Parenthood of the Rocky Mountains ("Employer"). (RD Dec. p. 1; Bd Ex. 1(d)). The Employer opposed this petitioned-for unit, arguing that the only appropriate unit must include these same classifications at all of its facilities located in Colorado, New Mexico and Nevada. (RD Dec. p. 2; R. 248).

The Region 27 Regional Director, weighing the community of interest factors set forth by the Board for determining an appropriate unit in a multi-facility operation to the record evidence presented by the parties,

> [C]onclud[ed] that the unit sought the Petitioner, with the exclusion of Salida, Colorado, is appropriate because the record reveals, on balance, that these Colorado locations have a substantial community of interest distinct from the community of interest they may share with employees in

> the Four Corners of Colorado, southern Colorado, New Mexico and Nevada.

(RD Dec. p. 18).

On April 16, 2018, the NLRB granted the Employer's Request for Review only as to the question of "whether the Regional Director's finding that the petitioned-for unit is appropriate is consistent with Board precedent concerning petitioned-for multi-facility units." (Bd. Order, April 16, 2018). Pursuant to 29 C.F.R. §102.67(h), Petitioner SEIU Local 105 submits this brief, responding to the question raised by the granted Review.

In a long line of Board cases, including *Clarian Health Partners, Inc.* 344 NLRB 332, 334 (2005); *Laboratory Corp of America Holdings,* 341 NLRB 1079, 1082 (2004); *Basha's, Inc.* 337 NLRB 710, 711 (2002); *Alamo Rent-A-Car*, 330 NLRB 897, 897 (2000) -- the Board has set forth the following factors to be evaluated in determining whether a petitioned-for multifacility unit is appropriate: employees skills and duties; centralized control of management and supervision; terms and conditions of employment; employee interchange; functional integration; geographic proximity; and bargaining history.[1] As shown below, applying these factors to the

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[1] In *Exemplar, Inc.,* 363 NLRB No. 157 (2016), the Board cited an additional factor – "extent of union organization and employee choice" – but made clear that consistent with *NLRB v. Metropolitan Life Insurance Co.,* 380 U.S. 438, 441-442 fn. 4 (1965), this factor could not be controlling. However, that does not mean that this factor no longer exists. As the Board stated in *Equitable Life Insurance,* 163 NLRB 192 (1967): "It is now well established that Section 9(c)(5) was intended to preclude the Board from basing its unit determination solely on extent of organization where other relevant criteria of appropriateness are absent. It was not intended to invalidate units which, as here, qualify under other tests of appropriateness." *See also Purity Food Stores, Inc.*, 160 NLRB 651, 660. Here, it is unnecessary for the Board to reach the issue of whether and how much weight should be given to the "extent of union organization" because the Regional Director did not rely on this factor, solely or as part of the basis to find an appropriate unit. At pp. 18-19 of her Decision and Direction of Election, the Regional Director listed the factors that supported the appropriateness of the petitioned-for unit and significantly, "extent of union organization" is not one of the factors she cited. And the Union's arguments in support upholding the Regional Director's decision do not consider and/or rely on the "extent of organization" factor.

record evidence, the Region 27 Regional Director directed an election in an appropriate unit for collective bargaining. As found by the Regional Director, this appropriate unit "constitute(s) a readily identifiable and functionally distinct group, with common interests distinguishable from" the excluded employees in the Employer-sought three-state unit, as shown by the functional integration, interchange of employees, geographic proximity and managerial/supervisory structure at the first and second levels that closely tracks the appropriately found unit. *See United Operations,* 338 NLRB 123, 126 (2002). Therefore, the Regional Director's Direction of an Election among this appropriate unit is consistent with Board precedent concerning petitioned-for multi-facility units.

II. FACTS

The Employer is a health care provider of reproductive health care services to patients in Colorado, New Mexico and Nevada. (RD Dec. p. 3; R. 25). The Union petitioned for an election among the employees designated as clinical staff in 15 Colorado-based health centers -- Arvada, Aurora, Boulder, Central Denver, Colorado Springs, Fort Collins, Denver Southeast (Glendale), Glenwood Springs, Granby, Greeley, Denver Southwest (Lakewood), Littleton, Denver Stapleton, Steamboat Springs and Salida.[2] (RD Dec. p. 1). There are approximately 154 employees in this petitioned-for unit, comprised of Heath Care Assistants (HCA), Registered Nurses (RN) and Advanced Practice Nurses (APN).[3] (RD Dec. p. 1). The Employer argues that the only appropriate unit is the clinical staff at all health centers in Colorado, New Mexico and Nevada. (RD Dec. p. 2).

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[2] The unit found appropriate included each of these 15 health centers, except Salida.

[3] As the unit found appropriate included 14 of the 15 health care centers, excluding Salida, and Salida has one employee, an APN, *see* Ptner. Ex. 1, the unit found appropriate has approximately 153 employees.

A. Employees' Skills And Duties.

There are approximately 91 HCAs in the unit found appropriate, and an additional 25 HCAs working in the excluded health centers. (RD Dec. p. 3). HCAs do not have to be licensed. (RD p. 3). The duties of these HCAs are similar with one notable exception – in Colorado and Nevada the HCA dispense medication but in New Mexico, this is prohibited by law and thus the APN must sign off to dispense medication. (R. 50-51).

RNs work in the five surgical centers, three of these centers are in the unit found appropriate. There are 20 RNs working in the three surgical centers within the unit found appropriate and 9 more in the other two surgical centers. (RD Dec. p. 3). The Employer's witness testified that there is an expectation that RNs are licensed in all three states, but she did not know if this was true and there was no evidence presented to show that RNs were licensed in any state other than where they worked. (R. 58). The RNs provide medical care, assist physicians, perform lab tests, screen medical histories and provide clients with information regarding birth control. (RD Dec. p. 3). RNs also take calls from clients that can originate in any of the three states. (RD p. 3).

APNs are licensed, but only in the state in which they work. (RD Dec. p. 3). There are 30 APNs in the unit found appropriate and 14 others working in the health centers that are excluded. APNs have advanced degrees that qualify them to perform higher level work than RNs. (RD Dec. p. 3). APNs provide primary reproductive health care services including reviewing health histories, recording findings, performing physical exams, providing birth control education services and participating in clinical services. (RD Dec. p. 3). In New Mexico, unlike Colorado and Nevada, APNs also dispense medication. (R. 65-66).

Finally, there are travelers and float employees. These travelers and floats could be a HCA, RN or APN. If he/she is a RN or an APN, then the traveler or float must be licensed in the state where they travel. As of the hearing, the evidence showed that one APN traveler was licensed in New Mexico, Colorado and Nevada. Travelers are full-time employees that work at various health care centers and pick up shifts where needed. Floats work where needed. There are five travelers and seven floats based in Colorado. There is one HCA traveler based in New Mexico. (R. Dec. p. 4).

B. Centralized Control Of Management And Supervision.

The administrative office is in Denver, Colorado and houses the highest levels of management. (RD Dec. p. 6). There are three Regional Directors and a Senior Director of Surgical Services. One of the Regional Directors, located in Albuquerque, oversees all non-surgical health care centers that are outside the unit found appropriate except for Cortez. The other two Regional Directors, one of which is temporally being covered by the Director of Patient Services, oversee the non-surgical centers within the unit found appropriate and Cortez.[4] (RD Dec. p. 6). All five surgical centers are overseen by the Senior Director of Surgical Services. (RD Dec. p. 7).

Each health care center has a manager. (RD Dec. p. 7). This manager is responsible for the day to day management and operation of their health care center and its staff. (RD Dec. p. 7). The manager directs the work of the employees in that health care center, completes the performance reviews of his/her employees, does the scheduling and leave requests for the employees at that health care center and usually determines which applicant is selected for an open position in that health care center. (RD Dec. p. 7). Discipline is usually initiated by that

[4] Cortez has one employee, an APN. (Ptner Ex. 1).

heath care center manager, conferring with his/her Regional Director. (RD Dec. p. 8). The health care center manager usually recommends promotions, subject to approval by his/her Regional Director. (RD Dec. p. 8). The health care center manager conducts staff meetings at his/her facility, approximately every two weeks. (RD Dec. p. 8). For a permanent transfer to a different facility, the employee must secure the signature from the manager at the facility he/she is seeking to transfer from and talks with the manager at the facility in which he/she is seeking to permanently transfer to. (RD. Dec. p. 8). There is training at each facility for that staff, covering OSHA, medical emergencies, patient donations and customer services. (RD Dec. p. 8).

The travelers and floats in Colorado have a separate supervisor. (RD Dec. p. 7). The one traveler in New Mexico is supervised by the Regional Director located in Albuquerque. (RD Dec. p. 7).

Each health care center also has an assistant health care center manager. This assistant health care center manager assists the heath care center manager in that facility in all aspects of the daily function of that facility. (RD Dec. p. 7).

HR is located at the Denver Stapleton location. (RD Dec. p. 7). They maintain all employee personnel records. (RD Dec. p. 7). While scheduling and leave requests are handled by the health care center managers. FMLA leave is monitored and approved by HR. Open positions are posted at headquarters and applicants are pre-screened by HR before sent to the Regional Director. The Regional Director generally does the first interview before he/she forwards applicant to the appropriate health care center manager for his/her interview and determination of whom to hire. (RD Dec. p. 7). HR conducts the annual salary survey and Vice Presidents make recommendations to top officials to establish salary. (RD Dec. p. 8). Payroll is done on a

centralized computer for all locations and employees. (RD. Dec. p. 8). There is a centralized warehouse for certain supplies for all facilities. (RD Dec. p. 8).

C. Terms and Conditions of Employment.

The pay scales and benefits are similar within each classification throughout the three states. (RD Dec. p. 17). The employee handbook covers all employees. (RD Dec. p. 17). New hires from all three states receive an initial orientation at the Denver Stapleton office – two days for HCA and three days for APNs and RNs. (RD Dec. p. 8).

D. Employee Interchange.

Based on the evidence presented, the vast majority of the interchange, through travelers and floats, occurred within the unit found appropriate. In the one-month period preceding the hearing, evidence showed that there were 926.25 hours of travelers and floats working at the various facilities in the unit found appropriate. (RD Dec. p. 14; Ptner Ex. 5, Er. Exs 25 and 26). There were 19 hours by one employee in Durango and 27.5 hours by two employees in Cortez. (RD Dec. p. 8). During this period, there was no evidence of any interchange between New Mexico and Nevada. (RD Dec. p. 14). As shown by Petitioner Ex. 4, during the ten-weeks preceding the hearing, the Colorado based travelers and floats worked frequently in facilities within the unit found appropriate, including the Denver, Boulder, Greeley, Fort Collins, Colorado Springs, Glenwood Springs and Steamboat Springs locations. During the same ten-week period, these travelers and floats worked infrequently in facilities outside the appropriate unit: one employee worked in Alamosa for one day, an employee worked two days in Cortez, one day in Durango and one day in Salida. (RD Dec. p. 15; Ptner Ex. 4, Er. Ex. 27). One traveler worked during four days of one week in New Mexico, but no other traveler or float worked in

New Mexico during this ten-week period and no traveler or float ever worked in Nevada. (RD Dec. p. 15; Ptner Ex. 4, Er. Ex. 27).

The Employer's COO testified that travelers and floaters worked in New Mexico and Nevada but offered no specific examples or any documentary evidence to support this generalized testimony. (RD Dec. p. 15; R. 54). However, an APN testified that she was scheduled five to six days a week, two in her home base in Aurora and the other three to four days in health care centers within the unit found appropriate. (R. 62). This APN is also licensed in New Mexico but has not worked in New Mexico in the past year preceding the hearing. Another APN testified that she works three to four days in Littleton health care center and just the day prior to the hearing worked in the Glenwood Springs center. (R. 84). This APN testified that she was not aware of any APN or RN coming from New Mexico to Colorado in the past year. (R. 85-85). An HCA testified that she transferred from Denver Stapleton to the Littleton facility and though she is not a traveler or float, she has covered shifts in Glenwood Springs, Aurora, Boulder and Greeley and in fact, goes to Glenwood Springs once a month for at least three days. (R. 117, 126-127). The one traveler located in New Mexico, an HCA, worked one time for three days in a facility within the unit found appropriate and was scheduled to work a few days in Colorado after the hearing. (RD Dec. p. 15-16; R. 245-246).

E. Functional Integration.

Each health care center operates independently. However, the evidence showed that employees will refer patients to other health care centers that offer services that their particular health care center does not offer. All of these patient referrals have been to other heath care centers that are part of the unit found appropriate. There have not been any patient referrals from

Colorado to facilities in southern Colorado (south of Colorado Springs), New Mexico and/or Nevada. (RD Dec. p. 13; R. 67, 68, 87-88, 101-102, 118-119).

F. Geographic Proximity.

The health care centers within the unit found appropriate runs generally along the north south corridor from the southern most point in Colorado Springs to the northern most point in Fort Collins. (RD Dec. p. 10). The traveling distance between Colorado Springs and headquarters (Denver Stapleton) is 67 miles, but as shown above, employees from Denver-based locations work in Colorado Springs and patients are referred to Colorado Springs from Denver-based facilities. Granby is 92 miles, Steamboat Springs is 163 miles and Glenwood Springs is 166 miles away from Denver Stapleton, but again, as shown above, employees from Denver-based locations work in these facilities. Also, these three facilities are the most northern mountain locations, with the Denver-based locations closer than any other facilities and easily accessible by highway. (RD Dec. p. 11).

The more southern locations in Colorado are Salida, 149 miles, Alamosa 226 miles, Durango 341 miles and Cortez, 387 miles from Denver Stapleton, (RD. Dec. p. 12; Ptner. Ex. 2), and the employee interchange with health care centers in the unit found appropriate is infrequent. The closest New Mexico location is Santa Fe, which is 366 miles from Denver Stapleton and obviously much closer to the southern Colorado facilities and those facilities in New Mexico. (RD Dec. p. 12; Ptner. Ex. 2). Neither of the Nevada facilities is even within 700 miles of Denver Stapleton and is not geographically contiguous with either Colorado or New Mexico. (RD Dec. p. 11; Ptner. Ex. 2).

G. Bargaining History

There is no evidence of any bargaining history. (RD Dec. p. 18).

III. ARGUMENT

As stated in the Introduction, the Regional Director, based on an application of the record to Board precedent regarding the factors to be considered in determining the appropriate unit for an election with an Employer who operates multiple facilities, found that the appropriate unit included all Colorado health care centers in the petitioned-for unit except Salida. She based this decision on the following factors that led her to the conclusion that this appropriately found unit had "substantial community of interest distinct from the community of interest they may share with employees in the Four Corners Region of Colorado, southern Colorado, New Mexico and Nevada", (RD Dec. p. 18):

> (1) reasonably close geographic proximity within the petitioned for unit from Colorado Springs northward as contrasted with the distances and geographic features formed by the mountain ranges for locations outside the petitioned for unit; (2) some functional integration within the petitioned for unit location as compared to more distance locations along with employee interchange between the petitioned-for locations and the absence of significant employee interchange with the other locations; and (3) a managerial/supervisory structure that reasonably (though not perfectly) tracks with the Petitioner's preferred unit, to include some regional and facility control.

(RD Dec. pp. 18-19). This determination should be upheld.

1. Initially, the Employer contends that in applying these factors, the Regional Director erred by not finding that there was a rebuttable presumption in support of its claimed employer-wide three-state unit. The only "precedent" offered by the Employer to support this argument is the Hearing Officer's Guide, which states at page 75 that "when all of the employer's facilities are sought in a combined unit ... an employer-wide unit is a presumptively appropriate unit." (Underline added). Putting aside that the Hearing Officer's Guide is not Board precedent, this statement in the Hearing Officer's Guide does not suggest that an employer has

the presumption, but rather that the petitioning union has the rebuttable presumption if it seeks an employer-wide unit.

A presumption in favor of the employer-claimed unit would run contrary to the well-established Board precedent that a union need not seek to represent employees in the ultimate unit, or even in the most appropriate unit. *See Barron Heating & Air Conditioning Inc.,* 353 NLRB 450, 452 (2004); *Morand Bros. Beverage Co.*, 91 NLRB 409, 419 (1950); *see also Wheeling Island Gaming*, 355 NLRB 637, n. 2 (2010). A presumption in favor of the employer-argued unit would mean that if the union did not rebut it, the petitioner would fail even though it sought an appropriate unit other than another appropriate or even most appropriate unit.

Moreover, Board decisions do not support the Employer's claim that a presumption applies to an Employer claimed-unit that is contrary to a petitioned-for unit. Petitioner is unaware of any case where the Board required a petitioner to rebut a presumption of the Employer's claimed unit. *Cf. Sleepy's Inc.*, 355 NLRB 132, 134 (2010)(where union sought multi-facility unit and employer claimed unit should be employer wide, the Board did not apply any presumption but rather weighed the various factors considered in deciding a multi-facility unit.).[5] Rather, the Board has only applied the presumption to the petitioner-sought unit. In *Capital Coors Co.,* 309 NLRB 322 n. 1 (1992), where the petitioning union sought a multi-plant unit and the employer argued for a single facility unit, the Board did not apply the presumption in favor of the single facility because "presumptive appropriateness of a single-facility unit is inapplicable where, as here, the petitioner seeks to represent a multifacility unit." *See also NLRB*

[5] In *Acme Markets, Inc.*, 328 NLRB 1208 (1999), after finding that the employer-wide unit was appropriate, in a footnote the Board cited to the cases that held an employer-wide unit is presumptively an appropriate unit. *See* 328 NLRB at 1210, n. 9. Significantly, in its analysis the Board did not apply such a presumption and require the petitioner to rebut it. Also, in each of the cases the Board cited in the footnote for this proposition, it was the petitioner, not the employer, that sought the employer-wide unit.

v. First Union Management, Inc., 777 F. 2d. 330, 333-34 (6th Cir. 1985)(Court rejected the employer's argument to apply the single facility presumption when employer argued for such a unit but the petitioning union sought a multi-facility unit).

Indeed, if the Employer's argument were correct then there could be two presumptions applied to the same case if petitioner sought and employer argued for units that the Board has each considered to be presumptively appropriate. For example, if the petitioner sought an employer-wide unit and the employer argued for a single facility unit then, under the Employer's theory both the presumption of the appropriateness of the employer-wide unit and the presumption of the single facility unit would apply. Not only would that be an evidentiary nightmare, that is not how it works. In *Greenhorne & O'Mara, Inc.*, 326 NLRB 514, 516 (1998), the petitioner sought an employer-wide unit and the employer contended that the appropriate unit was a single facility. There, the Board only applied the presumption in favor of the employer-wide unit because "Petitioner seeks to represent a unit on an employer-wide basis." On the other hand, in *Samaritan Health Services,* 238 NLRB 629, 632 (1978), where the petitioning union sought a single facility and the employer argued for a system-wide unit, the Board only applied the single unit presumption. In other words, the presumption does not apply to the employer-argued unit but rather only to the unit sought by the petitioning union if such a presumption should be applied to the sought unit. Here, however, as the Regional Director correctly found, there was no presumption for the petitioned-for multi-facility unit. (RD Dec. p. 5), and thus the Regional Director correctly weighed the various factors in reaching her determination without any presumptions.

But it is unnecessary for the Board to resolve this issue concerning the application of presumptions because even if the Employer had a presumption in favor of an employer-wide unit

and the petitioner union had to rebut it, applying Board precedent, the evidence supports a finding that this presumption for an employer-wide unit was rebutted and that the Regional Director correctly weighed the various factors and found that the unit was appropriate. *See We Care Transportation*, 353 NLRB 65, 67 (2008)(applying the traditional factors to determine whether a presumption that favor the petitioned-for unit was rebutted).

2. "'Because unit determinations are dependent on slight variations of the facts, the Board decides each case on an *ad hoc* basis, and it is not strictly bound by its prior decisions.' [citations omitted]. Each decision ultimately rests on the particular circumstances of that unique case." *NLRB v. Carson Cable* TV, 795 F. 2d 879, 885 (9th Cir. 1986). In evaluating the evidence to determine whether the unit is appropriate, the Board weighs this evidence under various factors: employees skills and duties; centralized control of management and supervision; terms and conditions of employment; employee interchange; functional integration; geographic proximity; and bargaining history. *Laboratory Corp of America Holdings,* 341 NLRB 1079, 1082 (2004) and other cases cited *infra,* p. 2. It then determines whether the interests of the employees in the unit found appropriate are "*sufficiently distinct* from those of other employees to warrant the establishment of a separate unit." *PPC Structural, Inc.*, 365 NLRB No. 160, 2017 WL 6507219 at p. *6 (2017)(italics included); *Wheeling Island Gaming*, 355 NLRB 637, n. 2 (2010).

Here, that is exactly what the Regional Director did. She found that the petitioned-for unit (less the one-employee Salida facility) is appropriate as the employees in that appropriately found unit share substantial community of interest through 1) common skills, duties and terms of employment; 2) functional integration among these facilities as employees refer patients for specific procedures only to other facilities within the appropriately found unit; 3) significant

employee interchange within the facilities in the appropriately found unit; 4) that these fourteen facilities are geographically proximate as evidenced by the fact that employees interchange between the facilities from the southernmost point of the unit to the facilities in the northern most point; and 5) the managerial/supervisory structure of facility managers and their regional directors, the first two levels of management that have significant authority over the day to day operation and oversight of the operation, though not perfect, closely parallel the appropriately found unit. (RD Dec. pp. 18-19).

The Regional Director further found that the interests of the employees in the unit found appropriate are "*sufficiently distinct* from those of other employees to warrant the establishment of a separate unit." *PPC Structural, supra*; RD Dec. p. 18. As the Regional Director explained, while the employees in the employer-wide unit also share common skills, duties and terms of employment, the indisputable evidence shows the following sufficient distinctions between the appropriate unit and the excluded employee: 1) some functional integration within the appropriately found unit while there was none with the employees from the excluded facilities; 2) significant interchange within the appropriate found unit, but there was no employee interchange between the appropriately unit and Nevada and almost no interchange with New Mexico; 3) there was geographic proximity among the appropriately found unit and not with the facilities excluded as shown not only by the distances between facilities within the appropriately found unit as compared to those outside it but also proven by the interchange among all of the facilities within the unit but almost none to none in the facilities outside the unit. Moreover, there were even larger distances between New Mexico and the appropriately found unit and between the non-contiguous state of Nevada and appropriately found unit (RD Dec. pp. 10-11).

In its Request for Review, the Employer claimed that the Regional Director's decision "departed from ... *Acme Markets, Inc.*, 328 NLRB 1208 (1999). (Er. Req. p. 4). The Employer's reliance on *Acme Markets* as precedent that required the Regional Director to find that the only appropriate unit was employer-wide is misplaced. In *Acme Markets,* the union petitioned for a unit covering three of the four contiguous states in which its operates pharmacies. The Regional Director rejected this petitioned-for unit because there was more interchange between the pharmacies in the excluded state and an included state, than among the three included states. *Id.* at 1209. Instead, the Regional Director ordered separate elections for each of the three states that were part of the petition. *Id.* The Board rejected this finding of three separate units by the Regional Director because the pharmacies were not administratively divided coterminous with each state and there was no evidence of significant interchange within each state. *Id.* Further, the Board found that while the originally petitioned-for three state unit shared "a significant community of interest, the record fails to show that their community of interest is distinct from the community of interest they share with the employees in the Employer's [excluded state] stores." *Id.*

However, the Board's finding that the only appropriate unit in *Acme Markets* employer-wide among the four contiguous states does not require the same result here. The reason is clear: as found by the Regional Director, the unit found appropriate shares a "community of interest" distinct from the community of interest in an employer-wide unit. Here, the appropriately found unit has significant employee interchange among its facilities, (Ptner Exs. 4, 5; R.62, 84, 117, 126-127), some functional integration of operations between these facilities, (R. 67, 87-88, 118-119), and the facilities are geographically proximate to each other, especially as compared to the excluded facilities. (Ptner Exs. 2, 3). However, the Employer-wide unit does not share these

factors. Nevada, for example has no employee interchange, no functional integration of operations with the petitioned-for unit and can hardly be characterized as geographically proximate as it is not even a contiguous state to the state where the facilities in the appropriately unit operate. Also, New Mexico and southern Colorado have insignificant interchange with the unit found appropriate, share no functional integration of operations and for the most part, those facilities are many more miles from even the southern-most facility in the unit than the facilities in the appropriate unit are from the Employer's headquarters.

The Regional Director's reliance on the lack of substantial interchange and lack of geographic proximity as two of the factors that led her to the conclusion that employees in the unit found appropriate are *sufficiently distinct* from those of excluded employees to warrant the establishment of a separate unit is hardly unique. In *Clover Fork Medical Services,* 200 NLRB 291, 292 (1972), the NLRB found a single unit appropriate over an employer-wide unit because "the distance between the clinics and the apparent lack of employee interchange [among the employer-wide unit were] sufficient to establish that the employees in the [petitioned-for facility] have a separate community of interest." There, like here, all facilities were administered centrally, each clinic had separate supervision and employees at all facilities had the same fringe benefits. In *Peter Kiewit Sons' Co.,* 231 NLRB 76 (1977), the Board did not find employees at one facility part of an appropriate unit with another facility because of a "distinct and separate community of interest" shown by different day to day supervision and lack of interchange. In *Samaritan Health Services,* 238 NLRB 629, 633 (1978), the employer-wide unit had the same policies and procedures that were centrally administered and uniformly, but there was autonomy among those who assigned and directed the work, geographic dispersion between the facilities and the absence of substantial interchange among the facilities led to the Board's rejection of an

employer-wide unit in favor of an single facility unit. Similarly, in the recent case of *Clifford W. Perham, Inc.*, 01-RC-191238, 2018 WL 329938 (2018), the Board denied a request for review of a Regional Director's decision finding an appropriate multifacility unit that excluded one facility "because the petitioned-for employees share of community of interest distinct from the employees at the [excluded facility]." *Id.* Those distinctions included separate lower level supervisors, lack of permanent transfers or temporary interchange with the included facilities and the excluded facility and lack of geographic proximity between the two facilities in one state and the excluded facility in another state.

And the Regional Director's reliance on substantial interchange within the unit as compared to the lack of substantial interchange among the employees in the excluded facilities is not insignificant. "The frequency of employee interchange has been regarded as a 'critical factor' in ascertaining a community of interest among employees." *NLRB v. Carson Cable TV*, 795 F.2d at 885; *Executive Resources Associates,* 301 NLRB 400, 401 n. 10 (1991)(citing *Spring City Knitting Co. v. NLRB,* 647 F.2d 1011, 1015 (9th Cir. 1981) for the proposition that "frequency of employee interchange is a critical factor in determining whether employees who work in different [groups] share a 'community of interest' sufficient to justify their inclusion in a single bargaining unit" and then finding that the "lack of significant employee interchange between two groups of contract employees is a strong indicator that the [petitioned-for group of] employees enjoy a separate community of interest."). Thus, this factor, which was present here and not present in *Acme,* is important in not applying *Acme*'s result to this case.

In its Request for Review, the Employer also claimed that the Regional Director "largely treated geographic separation as dispositive." (Er. Req. p. 7). The Employer's characterization of the Regional Director's finding is inaccurate. Rather, the Regional Director found that this

factor, like the other factors of employee interchange, functional integration of operations and first and second level supervisory control, favored the petitioned-for unit (less the Salida facility). (RD Dec. pp. 11, 18-19). Considering this as one of the four factors that made the appropriately found unit distinct from the employer-sought three state unit does not show that this one factor was "dispositive."

The fact is that inclusion of the facilities in Nevada, which was demanded by the Employer as a necessary part of the "only" appropriate unit that it seeks, (*see* R. 248), would have provided a sufficient basis to reject this employer-sought unit. The facilities operated by the Employer in Nevada, a state not contiguous to Colorado, are more than 700 miles from the Employer's headquarters. (Ptner Ex. 2). There is no evidence that shows that these distant facilities have employee interchange with any facility in the appropriately found unit. Because of this distance, there is no functional integration of operations among the Nevada facilities and the facilities in the appropriately found unit. The first and second level supervisors covering Nevada do not cover or provide oversight for any of the facilities in the appropriately found unit.

The facilities in New Mexico are not much different. Each of these facilities is 366 or more miles away from the Employer's headquarters. (RD Dec. pp. 10-11; Ptner. Ex. 2). In the six months leading up to the petition there is only one example of employee interchange between an employee based in New Mexico and a facility within the appropriately found unit and that was for a total of three days. (R. 245-246). In Nevada, unlike the facilities within the appropriately found unit, New Mexico employees do not refer clients to facilities located within the appropriately found unit, nor vice versa. (R. 68, 88, 101-102, 118-119). The only difference from Nevada is that one of the four facilities in New Mexico, a surgical center, has the same second level supervisor as the three surgical centers within the appropriately found unit. But the second

level supervisor for the three other New Mexico facilities is the same as that supervisor for Nevada and not for any facility within the appropriately found unit.

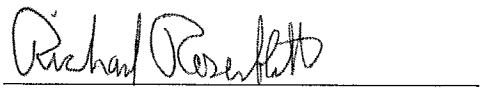
In its Request challenging the Regional Director's finding as to geographic proximity, the Employer focused on the southern Colorado facilities, which are closer geographically to the headquarters then those facilities in New Mexico or Nevada. (Er. Req. pp. 8). But the Employer does not assert that the Regional Director erred by finding that a unit of all Colorado facilities is inappropriate. (*See* RD Dec. p. 12).

IV. CONCLUSION

For each of the reasons stated above, the answer to the question posed by the granted Request for Review of whether the Regional Director's decision is consistent with Board precedent is YES! Therefore, the NLRB should find that the Regional Director, consistent with Board precedent for multi-facility units, correctly ruled that the petitioned-for unit (less Salida) is an appropriate unit for collective bargaining. Therefore, the Employer's appeal of the Regional Director's Decision and Direction of Election should be denied.

Respectfully submitted,

Dated: April 30, 2018



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 30th day of April, 2018, I mailed, by first class mail, a true and correct copy of **PETITIONER'S BRIEF IN RESPONSE TO THE ISSUE IN THE GRANTED REQUEST FOR REVIEW** to:

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